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IN THE

Supreme Court of the United States

October Term, 1966

No. .....

HAROLD EUGENE WENZLER, SR.,

Petitioner,

vs.

PETER PITCHESS, Sheriff of Los Angeles County, *et al.*,

Respondents.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondent prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 11, 1966, be denied.

Statement of the Case.

Petitioner on January 2, 1962, was charged in a two-count complaint with violations of Section 311.2 of the Penal Code of the State of California. It was alleged in the complaint that petitioner had knowingly distributed certain "obscene matter, to wit: Motion Picture Films at the Oaks Theatre, 85 North Fair Oaks Avenue, in the City of Pasadena, County of Los Angeles, State of California, in violation of the said statute."

The cause was tried on March 19, 1962, before the Honorable Louis T. Fletcher, Judge of the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, sitting without a jury after waiver by both parties.

The trial was concluded on March 21, 1962, and the matter taken under submission by the judge. On March 28, 1962, the court found petitioner guilty on Count I of the complaint and not guilty on Count II.

Jurisdiction.

From judgment of conviction by the Pasadena Municipal Court, petitioner prosecuted an appeal to the Appellate Department of the Superior Court of the State of California, County of Los Angeles. The Appellate Department affirmed the judgment of conviction on October 30, 1962.

Petition for rehearing, or in the alternative, for certification of the case to the District Court of Appeal was denied on November 9, 1962.

By order of Mr. Justice Brennan dated December 18, 1962, the judgment of conviction was stayed pending the filing and disposition of a petition for Writ of Certiorari. By order of Mr. Justice Douglas dated January 29, 1963, the time to file the petition for Writ of Certiorari was extended to April 4, 1963.

Subsequent to the denial of a rehearing and in the alternative for certification to the District Court of Appeal as aforestated, petitioner filed for a Writ of Habeas Corpus, No. 8845, in the District Court of Appeal. Said petition was denied on February 18, 1963. Petitioner then filed for a Writ of Habeas Corpus, No.

7344, to the Supreme Court of the State of California. That petition was denied on March 20, 1963.

In a habeas corpus proceeding, the Supreme Court of the State of California could determine whether petitioner was deprived of his constitutional rights and whether the statute is constitutional.

In re Bell, 19 Cal. 2d 488.

Petitioner, having utilized every judicial forum in the State of California, proceeded to the United States Supreme Court with a Writ of Certiorari, (*Wenzler v. California,* No. 969, October Term, 1962). Subsequent to a denial of Certiorari by the United States Supreme Court on June 22, 1964, (No. 969, October Term, 1962), and a denial of petition for rehearing in the above-entitled case on October 12, 1964, (No. 99, October Term, 1963), the case was sent back to the Pasadena Municipal Court for sentence.

Upon imposition of sentence, petitioner filed an application for a Writ of Habeas Corpus in the United States District Court, Southern District of California. (*Harold Eugene Wenzler, Sr. v. Peter Pitchess, Sheriff of Los Angeles County,* 64-1498-Y). The petition for the writ was denied as well as a motion for a new trial, Judgment having been entered on November 18, 1964, in conjunction with the Findings of Fact and Conclusions of Law and the Order of the Court.

Thereafter Petitioner appealed from the United States District Court to the United States Court of Appeals for the Ninth Circuit. On April 11, 1966 (No. 19,881) that court affirmed the judgment of the District Court. That Opinion appears as "Appendix A" in Petitioner's Brief in support of his Petition for a Writ of Certiorari before this Court.

Argument in Re Questions Presented.

1. The judgment of conviction was not rendered in violation of the provisions of the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution because "Obscenity" is not protected by the Constitution.

Roth v. U.S. and Alberts v. California (1957), 354 U.S. 476.

(a) The knowledge of obscenity of the film in question was in fact established on the part of Petitioner by both direct and circumstantial knowledge of the contents. Under California law proof of "knowledge of the contents of the film involved" would appear to be sufficient proof of "scienter".

"— on the issue of scienter it may be relevant whether the defendant actually read the allegedly obscene matter prior to the sale of the material."

Zeitlin v. Arnebergh (1963), 59 Cal. 2d 901, footnote 13 incorporated therein, p. 910.

The prosecution proved to the satisfaction of the trial judge that Petitioner had knowledge of the contents and nature of the film. Presumably he has an individual view of what constitutes "obscenity", and does not even now concede, at least officially, that those contents of which he was admittedly aware at the time of the sale were and are "obscene".

We respectfully submit that the film itself is patently obscene, and has in fact been so found, as a matter of independent judgment, by the trial court, the Appellate Department, the Federal District Court, and the Federal Circuit Court Judges. To know its contents then is to know that they are obscene.

People v. Harris, 192 Cal. App. 2d 887, 892.

(b) The record of the trial as well as the various pleadings which make up the record in this case are replete with evidence introduced by the People *in re* "contemporary community standards".

The ultimate question of whether or not the film was "obscene" within the standards of determination fixed by the United States Supreme Court was one of "constitutional fact" for the individual courts to determine.

Roth v. U.S. and Alberts v. California (1957), 354 U.S. 476;

Jacobellis v. Ohio (June 22, 1964), 378 U.S. 184.

(c) The standard of measurement as to obscenity was not limited by any of the judges considering the merits of this case to those of "the local community wherein petitioner was prosecuted."

Roth-Alberts was decided in 1957, and Alberts was a California case. Pursuant thereto, in 1961, the California State Legislature had amended and reinacted its "obscenity statute" in a studied effort to conform thereto. The trial judges and prosecutors of California, as well as the appellate judges situated therein, remote though they may be from the geographical forum of the United States Supreme Court, are nonetheless avid readers of its many and varied opinions, and strict adherents to its august mandates.

All of the requirements of Roth-Alberts, as well as the California Legislature, and the collection of opinions in the *Jacobellis* case which came later, and the California *Zeitlin* case, have been complied with by

every judge who has sat in judgment on this particular film.

(d) The statute under which the prosecution was brought was treated exactly as required by Roth-Alberts, in the light of the specific definitions and guidelines pursuant thereto. On every level, each judge personally viewed the film, and after applying the constitutional tests and standards imposed by the United States Supreme Court in the above cases, and exercising his own independent constitutional judgment, found the film to be "obscene" by those standards.

(e) Although this case was decided in the state courts prior to the *Zeitlin v. Arnebergh* case in which the California Supreme Court added to the statutory and judicial definitions of "obscene" the identifying term, "hard core pornography", the test made by each court did in fact meet that standard. *Zeitlin* did not remove "obscene" from the statute and substitute "hard core pornography" therefore. It merely sought to further clarify the term, "obscenity" through the definitive use of that phrase. At most it made "hard core pornography" a synonym for "constitutionally unprotected obscenity".

(f) The film speaks for itself. It is obscene. It has no socially redeeming quality. It appeals totally to the prurient interest. It is "hard core pornography", and it has been so adjudicated.

2. The federal Circuit and District courts fulfilled all their constitutional, judicial, and legislative obligations in determining, through the exercise of "independent constitutional judgment" after having viewed

the film in question, that it was "obscene" within the definition of the California statute and the requirements of Roth-Alberts, as well as all other cases binding upon them up to the time of their decisions and judgments.

Reasons for Denying the Writ.

1. The free speech provisions of the Constitution are not applicable if the film is obscene.

> "Obscenity is not within the area of constitutionally protected speech or press."
>
> *Roth v. United States*, 354 U.S. 476.

2. The California statute is constitutional in that it does not violate the constitutional requirements of due process.

> "The Constitution does not require impossible standards; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct' when measured by common understanding and practices."
>
> *United States v. Petrillo*, 332 U.S. 1, 7, 8;
>
> *Alberts v. California*, 354 U.S. 476.

3. All the tests and standards established by the United States Supreme Court in the cases dealing with "obscenity" have been met.

> *Manual Enterprises v. Day*, 370 U.S. 478.

4. The film here under consideration is utterly without redeeming social importance. It appeals solely to the prurient interest. It is, in fact, so offensive on its face as to affront current community standards of decency in any community throughout the nation.

> "A thing is obscene if considered as a whole its predominant appeal is to prurient interest and

if it goes substantially beyond customary limits of candor in description or representation of such matters."

American Law Institute;

Roth v. United States, 354 U.S. 489;

Approved in *Jacobellis v. Ohio* (1964), 378 U.S. 184.

5. Petitioner knew the character and contents of the film. He had the opportunity to judge for himself as to its obscenity. If he judged wrongly he did so at his own risk.

The issue is: Whether the film transgresses the standards imposed by the constitutions and the Legislature; our judicial system entrusts this decision ultimately to the courts.

Zeitlin v. Arnebergh (1963), 59 Cal. 2d 901, 910.

Conclusion.

The trial court and the reviewing court in each instance has made an independent examination and determination of the whole record including the film and determined its obscenity as a question of constitutional judgment.

We therefore submit that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BYRON B. GENTRY,
Counsel for Respondents.